Supreme Court of the

October Term, 19

163-676

ATCHISON, TOPEKA AND
FE RAILROAD COMPANY

Plaintiff in

vs.

PATRICK MULLIGAN, also
RICK GUTNER,

Petition of the Atchison,
Fe R.R. Co. for a writ of
United States Circuit Court
the Seventh Circuit.

Attorneys

Washington, D. C.

October Term, 19

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

ATCHISON, TOPEKA AND SANTA FÉ RAILROAD COMPANY,
PLAINTIFF IN ERROR,

v.

PATRICK MULLIGAN, *alias* PATRICK GUIVER.

} *No.*

Petition for Writ of Certiorari requiring the Circuit Court of Appeals for the Seventh Circuit to certify to the Supreme Court of the United States for its review and determination the case of the Atchison, Topeka & Santa Fe R.R. Co., Plaintiff in Error, v. Patrick Mulligan, alias Patrick Guiver.

To the Honorable the Supreme Court of the United States:

The petition of the Atchison, Topeka & Santa Fé Railroad Co. respectfully shows to this honorable Court as follows:

STATEMENT.

This is an action brought against the Railroad Company in the Superior Court of Cook County, Illinois, for in-

juries alleged to have been received by plaintiff while in the Company's employ (R. 6). After filing of declaration, the cause was removed, on petition of the Railroad Company, into the Circuit Court of the United States for the Northern District of Illinois, on ground of diverse citizenship (R. 10–13). It was there tried and judgment rendered against the Railroad Company for $12,500 (R. 26). Writ of error was then taken to the Circuit Court of Appeals for the 7th Circuit, where, on January 23, 1895, the judgment was affirmed (R. 215). Petition for rehearing was denied, on October 7, 1895 (R. 227). Pending such petition the plaintiff died. No representative has since been substituted and the mandate has not yet issued from the Circuit Court of Appeals.

The decision of the Court of Appeals (Jenkins, J., dissenting) rules that errors were not assigned in that Court in accordance with Rule 11 thereof, and upon this ground that Court substantially decided the case.

Such Rule 11 reads as follows (U. S. Appeals, Vol. 4, 8th Circuit 1, 1891–1892, page 710):

"The plaintiff in error or appellant shall file with the "Clerk of the Court below, with his petition for the writ "of error or appeal, an assignment of errors, which shall "set out separately and particularly each error asserted "and intended to be urged. No writ of error or appeal "shall be allowed until such assignment of errors shall "have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment "of errors shall quote the full substance of the evidence "admitted or rejected. When the error alleged is to the "charge of the Court, the assignment of errors shall set "out the part referred to *totidem verbis*, whether it be in "instructions given or in instructions refused. Such "assignment of errors shall form part of the transcript of "the record and be printed with it. When this is not "done, counsel will not be heard, except at the request of

" the Court; and errors not assigned according to this " rule will be disregarded; but the Court, at its option, " may notice a plain error not assigned."

Except in the requirement that assignment of errors should be filed before issuance of writ of error, this rule, with respect to all matters which shall be contained in the assignment of errors, and their manner of statement, is in literal accord, in language and intent, with paragraphs 2 and 4 of Rule 21 of this Court.

The manner in which the errors were assigned in present case *literally* follows this requirement. They are found in the record (pp. 199, 208). The errors are clearly and separately specified under each head, beginning—

1st. With assignment of the specific errors, by numbered paragraphs, in the rulings of the Court denying defendant's motion to instruct the jury to find a verdict for the defendant (R. 199–200).

2d. " In admitting against the objection of the defend- " ant the following evidence." Thereunder is set out the full substance of the evidence thus admitted and objected to, and under separate, lettered paragraphs (R. 200–203).

3d. " The said Court erred in giving to the jury the " following instructions, and counsel for defendant then " and there excepted specifically to *each* of the following " portions of said Court's instructions." Thence follow in numbered paragraphs the portions of the charge objected to, " *totidem verbis*," in precise accord with the language and intent of Rule 11 (R. 203–204).

4th. " Said Court erred in refusing to give to the jury " the following charges which were *severally* requested by " the defendant and *severally* refused by the Court." Then follows in numbered paragraphs and " *totidem verbis*" the charges thus severally asked and severally refused (R. 204–207).

5th. "Said Court erred in refusing to allow the defend-
"ant's motion for special findings, and to submit the
"questions contained in said motion to the jury. De-
"fendant asked to have the following questions submitted
"to the jury." Thence follows in numbered paragraphs each specific question.

This mode of assigning errors, both in form and substance, was as clear and orderly as could be expressed in written language.

It follows literally the form given in Mr. Loveland's recent work on Forms of Federal Procedure (p. 615), and which the author in his preface states is made up from approved forms in actual cases. Moreover, it marshaled the various classes of errors (1) in admitting evidence; (2) in refusing evidence; (3) in charging; (4) in refusing to charge, in such manner that the reviewing Court could readily grasp the case in the same clear and orderly way in which the errors were presented. The object of all pleadings and procedure in this enlightened day is to secure (1) certainty, and (2) clearness. The repetition of vain and useless words, which simply encumber the record (and, as the lamented Mr. Justice Miller once remarked, seem to be solely for the benefit of the printer), is thus avoided without the slightest sacrifice to either certainty or clearness, but with directly contrary result.

Tested by the errors as set forth in the manner presented in this record, the most casual reader could not doubt that under each proposition the several numbered paragraphs did clearly and unmistakably assign errors as to each, (1) because the opening sentence of that particular heading clearly so stated, and (2) because no other conclusion could possibly occur to the mind of the reader. Yet the Court of Appeals in this case criticise the *form* in which these errors are assigned, and declare that the

same do not "set out separately and particularly each "error asserted and intended to be urged." We cannot better answer this declaration than by quoting the dissenting opinion of Judge Jenkins herein, wherein, after recital of the manner in which the errors are assigned, he adds:

"I am of opinion that the errors asserted are 'separately "'and particularly stated' within the true intent and "meaning of the rule. I am able to perceive no possible "good to result from the requirement that each particular "instruction or request shall be prefaced with the formal "assertion of error in giving or refusing. Such require-"ment would only encumber the record with useless rep-"etition. It is to my thinking much more orderly to assert "the errors by classes as here was done; the errors of "admission of evidence, the errors of exclusion of evi-"dence, the errors in refusing requests to charge, and the "errors in the charge being assembled in separate classes, "each error within its class being separately stated and "particularly numbered. The Court cannot then be "misled or confused. Such presentation of errors in my "judgment accords both with the spirit and the letter of "the requirement. The purpose of the rule is to obtain "an orderly presentation of the errors relied upon, that "the Court may at a glance, and without laborious search, "ascertain the precise grounds asserted against the integ-"rity of the judgment. The rules are rules of order and "of convenience. They are not designed to prevent the "correction of obvious errors. They are not traps for the "unwary; not 'springes to catch woodcocks.' The rule "itself expressly reserves to the Court the right at its op-"tion to notice a plain error not assigned. The rule is a "counterpart of a like provision in the rules of the Su-"preme Court. I find in the opinions of that Court con-"struing the rule no suggestion of a construction of it so "technical as that declared in the opinion of the Court. "I cannot but think that the ruling of the Court in this "regard is a sacrifice of substance to form."

Moreover, condemnation of the form in which these errors are assigned in present case, as pronounced by the majority opinion herein, stands in direct conflict with the conclusions reached by the U. S. Circuit Court of Appeals for the 5th Circuit in case of *Florida Cent. and P. R.R.* v. *Bucki et al.*, decided June 25, 1895 (68 Fed. Rep., p. 864), and which is well expressed by the syllabus, thus:

"An assignment of errors made up by basing a sepa-
" rate assignment upon every exception taken during the
" trial on which exception was taken to every ruling of
" the Judge, is equivalent to a general assignment of
" errors within Rule 11 of the Circuit Court of Appeals."

As Rule 11 of the Circuit Court of Appeals for the 5th Circuit is in identical language with the same rule prescribed in the 7th Circuit, it is manifest that the form of the assignment of errors followed in this case, and condemned by the Circuit Court of Appeals for the 7th Circuit, is precisely the *contrary* of the form approved under the same rule by the Circuit Court of Appeals in the 5th Circuit.

Uniformity of procedure and uniformity in construction and application of the *same* rules prescribed in all of the Circuit Courts of Appeals is matter of greatest importance. One construction of the rule by one Circuit Court of Appeals and an entirely opposite construction of the identical rule by another Circuit Court of Appeals can only produce confusion, injury, and resulting reproach to the law as administered in federal tribunals. Under such circumstances, and as here presented, the review of this Court is justified, under the familiar principle announced in *Columbus Watch Company* v. *Robbins* (148 U. S. 266, 270), that where different Circuit Courts of Appeals have rendered different judgment under the same

conditions, the resulting discord "might furnish ground "for a *certiorari* on proper application" to this Court.

It is a familiar principle that rules of procedure in judicial tribunals authorized to be prescribed by them form part of the law, and their construction should not rest in the discretion of each Court, but is justly subject to judicial review by the higher Court. Otherwise, it might happen that the plainest rules of procedure could, by some strange construction given by the Court, be made the instrument of direct injury and oppression visited upon those suitors who have followed exactly and literally the requirements of such rules. Certainly nothing is more necessary than that the jurisdiction exercised by federal courts, existing now over forty-four separate States, and based upon uniform rules of procedure, should, with respect to the construction and application of such rules, be uniform. Certainly that principle must obtain with respect to substantial matters which affect the rights, obligations, and resulting personal and property interests of suitors. Otherwise, and illustrated by the case at bar, an assignment of errors in the form here presented, whilst condemned and rejected in the 7th Circuit, would be approved and accepted in the 5th Circuit, and, *contra*, the form declared as necessary in the 7th Circuit would be rejected (as shown by the case cited *supra*) in the 5th Circuit. The necessity for uniformity is still further emphasized by the fact that Rule 11 of both Courts, identical in language, is in every substantial part the repetition of Rule 21 of this Court, and from which it was undoubtedly formulated.

Under such conditions, recognition of the rights of these inferior courts to apply different and contradictory construction to identical rules, operative in each jurisdiction, will introduce and maintain such confusion in procedure

as to most unjustly and unnecessarily destroy the rights of litigants.

II.

The result of the Court of Appeals' condemnation of the form in which the assignment of errors herein was there presented is to deny the substantial rights of the railroad company.

This is most clearly shown by the dissenting opinion of Judge Jenkins. We cannot without useless repetition make this more apparent than is done in Judge Jenkins' opinion as follows:

"I think, however, that certain of the instructions re-
" quested and not covered by the charge, should have
" been given.

"The second request was as follows: 'No recovery can
" 'be had by the plaintiff in this case on account of the
" 'position of the push-pole upon the locomotive at the
" 'time of the accident.'

"The declaration originally filed had but one count and
" asserted the accident to have been caused solely by rea-
" son of the presence of the push-pole. That count as-
" serts that the defendant in error stepped upon the foot-
" board of the engine; that almost immediately thereafter
" he brushed against and felt a rod or pole which he after-
" wards learned was a push-pole for pushing cars in the
" railroad yards, projecting from the front part of the en-
" gine; that he grasped hold of it for support, whereupon,
" being unsecured, it suddenly gave way and caused the
" plaintiff to fall, and he was with great violence thrown
" to the ground, &c. The declaration originally filed avers
" the negligence of the company causing the injury to
" consist in allowing the push-pole to be placed on the
" front part of the engine, in an unsafe and insecure man-
" ner, where it improperly belonged.

"Upon his examination the defendant in error stated
" that this pole was in common use about the engine by

" the switchmen and was usually placed on the tank,
" where it could be most conveniently obtained for use.
" Under objection and exception he was permitted to tes-
" tify that it was not customary for the employees to place
" the push-pole in front of the engine. The evidence at
" the trial disclosed, according to the theory of the de-
" fendant in error, that the injury resulted from the break-
" ing of the foot-board, and that as the board broke
" the defendant in error reached out for support and
" grasped the push-pole lying unfastened upon the
" front part of the engine. It is entirely clear that
" the injury was in no respect caused by the presence
" of the push-pole, and the instruction should have
" been given. The original declaration asserted the
" presence of the push-pole as the principal inducing
" cause of the injury. It was not so in fact. Its presence
" upon the engine did not tend to establish negligence
" on the part of the company. It was placed there by
" some employee, and if it was negligently and improperly
" so placed, it was so done through the negligence of a
" co-employee, and was one of the risks of service assumed
" by the defendant in error. It is true that the court in
" its charge states that the evidence had been *particularly*
" directed to the defective foot-board, and that the testi-
" mony on the part of the plaintiff had been by the court
" *substantially* limited to the averment respecting the
" character and condition of the foot-board and the con-
" nection between the same and the plaintiff's injury.
" But this did not exclude from the consideration of the
" jury the evidence with respect to the presence of the
" push-pole upon the engine, or its alleged connection
" with the injury. The Court should have withdrawn that
" matter wholly from the consideration of the jury. It
" cannot be safely affirmed that the evidence concerning
" the push-pole, and the refusal of the Court to give the
" instruction requested, did not influence the jury to the
" injury of the plaintiff in error. I conceive it to be the
" duty of the trial court, in cases of this character
" especially, to eliminate from the case so far as possible
" all extraneous considerations and all irrelevant testi-

" mony, and to specifically charge the jury, when so re-
" quested, that particular evidence which has been im-
" providently admitted, or a particular fact asserted in
" the declaration as the moving cause of the injury but
" which has no legitimate connection with it, should be
" disregarded by the jury.

" I am also of opinion that the third instruction re-
" quested should have been given. That instruction was
" as follows: ' The plaintiff has alleged in his declaration
" ' that the defendant was negligent in the manner of the
" ' construction of the foot-board of the locomotive from
" ' which the plaintiff fell. The only fact appearing in
" ' evidence relied upon to sustain this charge is that the
" ' iron hangers or stirrups upon which the foot-board
" ' rested did not extend entirely to the outer edge of the
" ' board. This fact is admitted, and it further indis-
" ' putably appears from the evidence that other locomo-
" ' tives of the defendant were constructed in the same
" ' manner, and that this locomotive, so constructed, had
" ' been in use by the plaintiff for several months prior
" ' to the accident. Upon these facts you are instructed
" ' that the plaintiff cannot recover in this case on account
" ' of the manner in which such foot-board was con-
" ' structed.'

" The declaration had been enlarged by the addition of
" two counts, the one asserting failure of duty in re-
" spect of construction, and the other in respect of repair
" of the foot-board. This foot-board was an oak plank
" some two inches in thickness. It appeared in evidence
" that most, if not all, the locomotives in use by the
" company were constructed in like manner with this one.
" It also appeared that such was the general manner of
" construction, and that it was safe if the board were
" sound. It also appeared that the defendant in error had
" been accustomed to ride upon this foot-board for some
" four months prior to the injury. The manner of its
" construction was open and notorious. It seems to me
" to be a great stretching of the rule of liability to say that
" under such circumstances the jury may declare that there
" was improper construction or original failure of duty by

" the company with respect to this appliance. Upon the " theory of the defendant in error as developed at the trial, " the accident was occasioned by reason of the crack in " the foot-board negligently permitted to remain in that " condition. The fault of the company, if any, was in this, " and not in the manner of construction of the foot-board. " It may be true, as asserted in the opinion of the Court, " that the manner of its construction was a fact proper to " be considered by the jury in connection with the alleged " defect in the foot-board, because enhancing the danger " from the defect and emphasizing the duty to repair. " The error, however, is in this: that not only was there " no instruction against liability in respect to the original " construction, but there was express submission of the " case upon that ground. If an instruction against such " liability would have been—as asserted by the Court— " impeachment of the intelligence of the jury, what shall " be said of a charge which expressly submitted the ques- " tion of failure of duty in respect of construction as ground " of liability? The Court failed to discriminate between " liability for failure of duty in the original construction " of the foot-board, and negligence in respect of its repair. " The case was submitted with sanction to the jury to de- " clare liability upon either or both hypotheses. It may " well be that under such charge the jury arrived at their " verdict upon the conclusion that the company should " have provided hangers or stirrups extending entirely to " the outer edge of the board and not upon any supposed " negligence with respect to keeping the board in repair. " I think it was clearly erroneous for the Court to refuse " the instruction requested.

" These errors are not technical, but substantial, and " should, I think, operate to the granting of a new trial."

This doctrine conforms clearly to the decisions of this Court.

Thus, in *Boston and Albany R.R. Co.* v. *O'Reilly* (158 U. S. 334, 337), it was held that—

" while an Appellate Court will not disturb a judgment " for an immaterial error, yet it should appear *beyond a* " *doubt* that the error complained of did not and could " not have prejudiced the rights of the party duly object- " ing. (*Deery* v. *Gray*, 5 Wall. 795, 807 ; *Gilmer* v. *Higley*, " 110 U. S. 47.)"

And in *Deery* v. *Gray*, *supra*, the same rule is thus expressed :

" We concede that it is a sound principle that no judg- " ment should be reversed in a court of error when the " error complained of works no injury to the party against " whom the ruling was made. But whenever the appli- " cation of this rule is sought, it must appear so clear as " to be, *beyond doubt*, that the error did not and could not " have prejudiced the party's rights."

Notwithstanding this settled doctrine, the majority opinion in the Circuit Court of Appeals in present case (p. 3) states :

" In some respects the instructions given are objection- " able, and some of the requests which were refused " ought, perhaps, to have been given, but the errors are " technical, and *probably* did not affect the result."

As clearly shown by the dissenting opinion of Judge Jenkins, such instructions given and refused both probably and properly affected the minds of the jury. As expressed by the decisions of this Court in the cases cited *supra*, it must appear *beyond a doubt* that the error complained of did not and could not have prejudiced the rights of the party duly objecting. Against that declaration and its resulting consequences, the suggestion of the Court in the present instance that the errors "*probably* " did not affect the result" cannot stand.

It should be further noted that no objection was made by counsel for the defendant in error in the Circuit Court of Appeals to the form in which the errors were assigned. The objection was raised solely by the Court. Yet in *Michigan Cent. R.R. Co.* v. *Consolidated Car Heating Co.*, before the Circuit Court of Appeals for the 6th Circuit (69 Fed. Rep. 1), rehearing was denied upon the ground that counsel for appellee had made no objection to the sufficiency of the assignment of errors with respect to the matter there involved.

Your petitioner has no right of appeal or writ or error in this case, for the reason that jurisdiction of the same was assumed by the United States Circuit Court solely because of the diversity of the citizenship of the parties plaintiff and defendant.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein entitled "Atchison, "Topeka and Santa Fé Railroad Company, plaintiff in "error, *v.* Patrick Mulligan, alias Patrick Guiver, defend-"ant in error," No. 183, to the end that the said cause may be reviewed and determined by this Court as provided in Section 6 of the Act of Congress entitled "An "Act to establish Circuit Courts of Appeals, and to define "and regulate in certain cases the jurisdiction of the "Courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as

to this Court may seem appropriate and in conformity with the said Act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this honorable Court.

And your petitioner will ever pray, etc.

ATCHISON, TOPEKA & SANTA FÉ R.R. CO.
By E. D. KENNA,
A. T. BRITTON,
A. B. BROWNE,
Attorneys for Petitioner.

Office Supreme Court U. S.
FILED.
NOV 11 1895
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

ATCHISON, TOPEKA AND SANTA FÉ RAILROAD COMPANY,
PLAINTIFF IN ERROR,

v.

PATRICK MULLIGAN, *alias* PATRICK GUIVER.

No. 787.

ON PETITION FOR WRIT OF CERTIORARI.

SUPPLEMENT TO PETITION.

The gravamen of the Company's petition is the refusal of the Circuit Court of Appeals to consider the substantial merits of the errors assigned in that Court because of assumed defects in the form of such assignment. The brief of counsel filed in this Court against allowance of the petition discusses the merits and *assumes* that the Court of Appeals decided the cause upon the merits because of its power to consider a plain error not assigned. That position begs the entire question. The petition is

presented here because that Court's majority opinion discloses that it *refused* to give effect to the errors presented because, in its view, not technically correctly assigned. The plain effect of the decision below is to deny either effect or consideration to the errors presented solely because of the form of their assignment, introducing thereby a radical departure from established practice and repudiating forms approved by reason and by previous adjudication, and which are in plain and literal accord with Rule 11, which applies "*totidem verbis*" in all the Circuit Courts of Appeals. Correction of such error presents matter of gravest importance. Controlling exposition from the Court of last resort with respect thereto is essential to uniformity of procedure and the just protection of litigants in all such Federal Courts.

The brief of opposing counsel reaches the undersigned upon the day this petition is noticed for submission. We do not understand that it is either necessary or proper for us to reply in this motion to the discussion upon the merits. The Court below refused to pass upon the merits. If this Court should grant the certiorari and thereafter reverse the findings of the Court of Appeals, it would necessarily send back the case for a hearing and decision upon the merits.

Respectfully submitted.

A. T. BRITTON,
A. B. BROWNE,
Attorneys for Petitioner.

Nov. 11, 1895.

NOV 18
JAMES H. McKENNEY

787

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1895.

ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY,
Plaintiff in Error,

vs.

PATRICK MULLIGAN, ALIAS PATRICK GUIVER,
Defendant in Error.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

ALBERT H. THOMPSON,
Attorney for Defendant in Error.

JOHN F. WATERS,
OF COUNSEL.

Barnard & Miller, Law Printers, 44 & 46 LaSalle St.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1895.

ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY,
Plaintiff in Error,
vs.
PATRICK MULLIGAN, ALIAS PATRICK GUIVER,
Defendant in Error.

Brief and Argument for Defendant in Error.

Answer of defendant in error to petition for a writ of certiorari requiring the Court of Appeals for the Seventh Circuit to certify to the Supreme court of the United States for its review and determination the case of Atchison, Topeka & Santa Fe Railroad Company, Plaintiff in error, v. Patrick Mulligan, alias Patrick Guiver.

To the Honorable the Supreme Court of the United States:

The answer of Patrick Mulligan respectfully shows to this Honorable Court as follows:

STATEMENT.

In addition to the statement of facts set out in the petition of plaintiff in error we wish to say that the injuries inflicted upon Patrick Mulligan (viz.: breaking his back in two places and producing paralysis of both limbs), were received about 10 o'clock at night on the 19th day of June, A. D. 1890. The case was argued orally and at great length before a full bench in the Circuit Court of Appeals of the United States; and elaborate briefs were filed by the plaintiff in error. The judgment of the Circuit court was affirmed and plaintiff in error filed a petition for a rehearing in which its *alleged* points were argued at great length. Pending the petition for a rehearing the plaintiff died, and his widowed mother being unable to give bond, Abram E. Mabie was appointed administrator and was substituted for Patrick Mulligan on the 9th day of October, A. D. 1895.

ARGUMENT

I.

Section 6 of the act of Congress of March 3, 1891, establishing the Circuit Court of Appeals makes the judgment of the Circuit Court of Appeals final in **this case** for the reason that **jurisdiction was dependent entirely upon the fact that the opposite parties to the suit were citizens of different states.**

In the language of this court (opinion by Chief Justice FULLER) *in re* Woods, 143 U. S. 202: "The Circuit "Court of Appeals were created for the purpose of re- "lieving this court of the oppressive burden of litigation "which embodied the examination or disposition of cases "of public concern, and **delayed suitors in the "pursuit of justice.** A *certiorari* will only be issued "where questions of **gravity** and **importance** are in- "volved."

Further on in the same opinion this court says: "We "do not regard an inquiry as to whether it was settled "law in the State of Minnesota that a judgment of dis- "missal in a former suit, such as pleaded here, was not "a bar to a second suit, upon the same cause of action, "or whether the law in respect to the recovery by a servant "against his master for injuries received in the course of "his employment was properly applied on the trial of "this case as falling within the category of questions of "such gravity and general concern as to require a review "of the conclusions of the Circuit Court of Appeals in "reference to them, and a writ of *certiorari* is therefore "denied."

Wherein can it be said that the case at bar is more grave or important than the Woods case?

II.

It is evident that the Circuit Court of Appeals were of the opinion that the **judgment in this case was for the right party; that substantial justice had been done,** and that **the judgment ought not to be disturbed,** because even though the *alleged* errors were not assigned in accordance with rule 11—rule 11 provides that "*The court, at its option, may notice a plain error* **not assigned**"; even though the alleged errors complained of by plaintiff in error were not assigned **in any form whatever**—the court *could* have reviewed them and *could have reversed the judgment* if the court had been of the opinion that any material error had been committed upon the trial of the case in the court below. It is, therefore, manifest that the Circuit Court of Appeals did not affirm the judgment of the Circuit court in this case **solely** because the plaintiff in error failed to assign errors in accordance with rule 11; but for the **additional, good and sufficient reason** that the court was of the opinion that **no prejudicial error had been** committed on the trial of the case in the court below.

It was a **lack of merit in the objections,** and not a lack of **form in the assignment** of errors that affirmed this case in the Court of Appeals.

III.

The dissenting opinion filed by Judge Jenkins in this case proceeds wholly upon a **misapprehension of the true facts in the case.**

The second instruction was properly refused.

In his dissenting opinion the learned judge says: "It "is true that the court in its charge states that the evi- "dence had been *particularly* directed to the defective "foot-board, and that the testimony on the part of the "plaintiff had been by the court *substantially* limited to "the averment respecting the character and condition of "the foot-board and the connection between the same "and plaintiff's injuries. But this did not exclude from "the consideration of the jury the evidence with respect "to the presence of the push-pole upon the engine or its "alleged connection with the injury." We do not contend that it did.

We do not claim that the court's telling the jury that the evidence had been *particularly* directed to the defective *foot-board* and that the testimony on the part of the plaintiff had been by the court *substantially* limited to the averment, etc., would **by itself** have been sufficient to justify the court in refusing the above instruction. But this **was not all** the court said on that subject. Nay, it is not one-half of what the court said on that subject. If it had been, Judge Jenkins would have been correct in saying that there was error in refusing the above instruction. The court went further, and in the instructions given **excluded from the consideration of the jury all reference to the push-pole** by telling the jury plainly and specifically:

"The burden is upon the plaintiff to establish by a "weight or preponderance of evidence that plaintiff was "injured by reason of the unsafe, unsound or improperly "constructed **foot-board."** (Rec., 196, Par. 2.)

This alone would have been enough to prevent any jury of sensible men from supposing they were to consider the position of the **push-pole** in determining whether defendant was negligent. But, in order that a "way-faring man might not err," the court *emphasized* the exclusion of all reference to the **push-pole,** by telling the jury a **second time**. "An accidental injury sustained "by the plaintiff while engaged in defendant's service of "itself creates no liability against defendant, but **in "order to fix such liability,** the weight of the testi- "mony must show, or satisfy you, that plaintiff, while "using due care, was injured by means of the improper "construction, and unsafe, and unsound condition of the "**foot-board."** (Rec., 197, Par. 4.)

If, with these two plain specific charges, that plaintiff could recover **only on account of the condition of the foot-board,** the jury were "numb-skulls" enough to think plaintiff could recover on account of the position of the **push-pole,** we submit that they were too dumb to understand the above instruction, even if it had been given. The language of the instructions given, as above quoted, is just as plain, and excluded the consideration of the position of the push-pole just as effectively as the refused instruction, and that was undoubtedly the reason the court refused the instruction. When the court had given **two** instructions plainly excluding the consideration of the position of the push-pole, we submit it would be ultra-technical to reverse this judgment, because the court refused to incumber the record with **three** (3) instructions to the same effect.

The learned judge further says: "It is entirely clear "that the injury was in no respect caused by the pres- "ence of the push-pole." If this is so clear, then how could the jury possibly be misled by the failure of the court to give the instruction? Is it not a reflection on the jury to say that they may have found defendant guilty of negligence in placing the push-pole on the front end of the engine although "it is entirely clear "the injury was in no respect caused by the presence "of the push-pole?"

IV.

THERE WAS NO ERROR IN REFUSING THE THIRD INSTRUCTION.

Judge Jenkins is also of the opinion that the third refused instruction should have been given. The instruction is as follows: "The plaintiff has alleged in his dec- "laration, that defendant was negligent in the manner "of the construction of the foot-board of the locomotive "from which the plaintiff fell. The **only fact** appearing "in evidence relied upon to sustain this charge is that *the "iron hangers or stirrups upon which the foot-board "rested did not extend entirely to the outer edge of the "foot-board.* **This fact is admitted,** and it further in- "disputably appears from the evidence that other loco- "motives of the defendant were constructed in the same "manner, and that this locomotive so constructed had "been in use by the plaintiff for several months prior to "the accident. Upon these facts you are instructed that "the plaintiff cannot recover in this case on "account "of the manner in which such foot-board was con- "structed." (Rec., 192, 193, Par. 3.) This instruc- "tion was properly refused in this case.

(*a.*) *First*, because it proceeds upon a **false assumption of facts.** The instruction asserts that the **only fact** appearing in evidence relied upon to sustain the charge of negligent construction, is that the "**iron hang-**" **ers did not extend entirely to the outer edge of the** "**foot-board.**" And that that was the **only fact** tending to show negligent construction. The evidence shows that a part of the split in the foot-board next morning was an **old crack**, and this was a fact which it was the duty of the jury to consider in passing upon the question of construction. If this **old crack** was in the foot-board when it was put on (and the jury might properly so find from the evidence), defendant was guilty of negligence in putting it on in that condition, or, to make it plainer, was guilty of **negligent construction,** and we therefore insist that for the court to have given this instruction, and thereby told the jury that the **only fact** appearing in evidence to sustain the charge of negligent construction was a failure to the hanger-irons to extend to the outer edge of the foot-board, and to have further told them that **"this fact is admitted,"** would have been reversible, error because **it ignores the material fact that there was an old crack in the foot-board,** and that the evidence tended to show that this old crack was there when the foot-board was first put on the engine. We are, therefore, of the opinion that it was not error to refuse this instruction, and that it would have been reversible error had the court given it.

(*b.*) *Second.* This instruction was properly refused for another reason. It would have told the jury, **as a matter of law**, that although the hanger-irons, contrary to what was customary with other companies, failed to extend out even with the edge of the foot-board, and that

such failure contributed to or caused the injury to plaintiff, yet plaintiff could not recover because the locomotive so constructed had been in use by plaintiff several months, and plaintiff, therefore, assumed the risk of using it in that condition, because he knew of the defect. **Such is not the law.** There was not a scintilla of evidence tending to show that **plaintiff knew** anything about the bad condition of the foot-board or hanger-irons. On the contrary the fact that he worked there **at night,** and that **it was not his duty to inspect the foot-board,** gives rise to the presumption that he **knew nothing** about the condition of the hanger-irons. But, even if he had known of the condition of the hanger-irons, that knowledge would not, **as a matter of law,** defeat a recovery. Although he may have **known** of the condition of the hanger-irons, **under the circumstances of this case, it was still a question of fact for the jury** to determine whether he was entitled to recover, and the court had no right, **as a matter of law,** to say that he could not recover. In *Greenleaf* v. *Railroad Company*, 29 Ia., 14 (cited and approved in Wood on Master and Servants, Par. 359), it was shown that the defendant had failed to provide hand-rails, platforms and other appliances on a freight-car to protect the servants while uncoupling the train, and that the **deceased was aware of such defect**, and it was there held that "**a** "**recovery would not necessarily be defeated** "**because of such knowledge** by the servant, be- "cause **when called upon to perform services** "**suddenly** he could not be presumed to have in mind "all the defects in the particular instrumentalities, and "the question as to whether his act was really negligent "was **for the jury**, taking into consideration all of the

" circumstances attending the act, the exigencies of the " service, and the suddenness of the call to the particu- " lar service," etc.

The case of *Missouri Pacific Railroad Company* v. *Lehmberg* (Tex. Supreme court, Nov. 8, 1889) is decisive of the question that mere knowledge of a defect by the employe of a railroad company does not, **as a matter of law,** bar a recovery.

The negligence charged in that case consisted in the use of a switch-engine having a square tank instead of a sloping one, the latter being more suitable for switching purposes. "The court refused to charge, at the de- " fendant's request, that if there were patent defects in " the engine or tank, that the deceased knew, or might " by ordinary diligence have known, of the same, and the " said defects contributed to the injury complained of, " the jury should find for the defendant. *Held*, that as " the evidence disclosed that the deceased could see that " the engine had a square tank, but failed to show that " he was aware of the different degrees of danger be- " tween the use of that and one with a sloping tank, or " that he understood the nature of the danger to himself " from the use of a square tank, **the charge was** " **properly refused,** as the law charged him with " knowledge only of such defects and dangers as were " open to his observation."

The evidence in the case at bar does not show that the plaintiff ever saw these hanger-irons that were **under** the foot-board, nor does it show that he was aware of the different degrees of danger between the use of them and hanger-irons in common use upon other roads; but, on the contrary, the evidence shows that he never worked for any other company, and therefore had no means of

knowing the different degrees of danger in the hanger-irons. He testified: "Q. Did you ever work for any "other railroad company except the Atchison, Topeka "and Santa Fe? A. No, sir, I did not." (Rec., 55.)

In *McDade* v. *Washington & Georgetown R. R. Co.*, 26 A. & E. R. R. Cases, 325 (District of Columbia, June 28, 1886), a case in which the act of negligence relied on for a recovery was the failure of defendant to use a loose pulley and lever or shifter for the purpose of putting on a belt, the court held "that the fact that the "plaintiff worked habitually with the machinery in question for a period of eighteen months is competent evi-"dence from which **the jury** may infer that plaintiff "was fully acquainted with its dangerous character, but "**it is not conclusive evidence; the jury** are to "determine its weight in fixing the extent of plaintiff's "knowledge, and how far it is qualified by the other cir-"cumstances of the case."

V.

EVEN ADMITTING, FOR THE SAKE OF ARGUMENT, THAT THERE WERE TECHNICAL ERRORS IN REFUSING TO GIVE THE INSTRUCTIONS ASKED, THE JUDGMENT IN THIS CASE WAS PROPERLY AFFIRMED.

"Error in the instructions is not ground for reversal "where it is manifest that the verdict was correct upon "the facts appearing in the record."

Memphis & Charleston R. R. Co. v. *Whitfield*, 44 Miss., 466.

"Misinstruction is no ground for a new trial where the "jury has not been misled, nor where the verdict is

" right, nor where *substantial justice has been done, nor* " *where a new trial would lead to the same result.*"

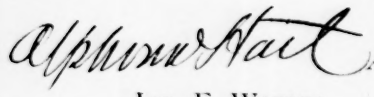
American En. of Law, Vol. 2, 266, and the vast array of authorities there cited.

" Where the evidence clearly shows that no other ver- " dict could have been properly returned by the jury, un- " der correct instructions, the Supreme court need not " reverse the judgment because of errors in the instruc- " tions **given** "—much less those refused.

Chig. & E. Illinois R. R. Co. v. *Kneirim*, Ill., June 14, 1894, 39 N. E. Rep., 324.

The railroad company has already delayed justice for over five years in this case. The plaintiff is now dead, so that the case cannot be again tried. A reversal of this case is denying to his aged and widowed mother the money two competent courts have decided this company should pay for the severe injuries it inflicted on him—injuries which entailed upon him five years of agony, until death came as a visitation of mercy.

Respectfully submitted.



ALBERT H. THOMPSON,
Attorney for Defendant in Error.

JNO. F. WATERS,
Of Counsel.